IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.11.2007

CORAM:

THE HONOURABLE MR.JUSTICE K. MOHAN RAM

Criminal Revision Case No.1056 of 2007 and
Miscellaneous Petition Nos.1 and 3 of 2007

Maharaja .. Petitioner

-Vs.-

1. The Sub Collector /
The Sub Divisional Magistrate
Gobichettipalayam,
Erode District

2. V.Subramaniam .. Respondents
(R-2 impleaded as per order dated 04.10.2007
made in M.P.No.2 of 2007 in Crl.R.C.No.1056 of 2007)

Prayer: Criminal Revision Case filed under Sections 379 and 401 of the Code of Criminal Procedure to call for the records relating to the order dated 12.07.2007 made in Na.Ka.No.8720/2007/A6 on the file of the Sub Collector / Sub Divisional Magistrate, Gobichettipalayam, and set-aside the same by allowing this Criminal Revision Petition.

For Petitioner : Mr. N.Manokaran
For Respondent : Mr. Hasan Mohamed Jinnah,
Government Advocate, for R-1.
Mr. S.Kaithamalai Kumaran, for R-2.

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O R D E R

The above revision has been filed against the order dated 12.07.2007 made in Na.Ka.No.8720/2007/2007/A6 on the file of the Sub Collector / Sub Divisional Magistrate, Gobichettipalayam. The order that is sought to be revised has been passed under Section 133 of the Criminal Procedure Code.

2. The main contention of the petitioner is that no enquiry as contemplated under Section 138 of the Criminal Procedure Code has been conducted by the Sub-Divisional Magistrate before passing the order. It

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is further contended that under Section 136 of the Criminal Procedure code the preliminary order can be made absolute only if a person fails to appear on receipt of the preliminary order. In support of the above said contentions the learned counsel for the petitioner relied upon the following decisions:-

(i) 1995 (II) CTC 152 (Sesamma Joy @ Chakko Mathew & Anr. v. Tahsildar, Vilavancode), wherein in paragraph 4 it is observed as follows:-

> "4. .... A causal reading of the above section of law would clearly show the fact that before proceeding in accordance with the provisions contained in Section 134 to 136 of the Code of Criminal Procedure, it is incumbent on the part of the Magistrate concerned not only to identify the type of nuisance alleged to have been committed, but also specifically deal with and spell out in the show cause notice to be given to the person perpetrated and then adequate time is expected to be given to such person to remove such nuisance as provided in clauses 1 to 6 of the proviso to Section 133 of the Code of Criminal Procedure and only on the failure to comply with the directions then, for the reasons to be recorded, he will make the order absolute and proceed further as provided under Sub sections of the Code of Criminal Procedure. Or otherwise, for any reason, if the said procedure has not been followed, the order then would become totally vitiated for the violation of the procedural mandate, simply for the reason that the procedure laid down under Section 133 of the Code of Criminal Procedure is based on the principles of natural justice and equality."

(ii) 1997 (I) CTC 305 (Preman, P. v. M.P.Andy), wherein in paragraph 5 it is observed as follows:-

> "5. .... The Executive Magistrate, while considering the cause shown by the aggrieved person is under a legal obligation to inquire into the matter before proceeding under Section 138, Cr.P.C. In other words, the inquiry contemplated under Section 137 shall precede the further proceedings under Section 138 of the Code, as could be seen from the wording of Section 137 (1) itself. Section 137 of the Code contemplates the Executive Magistrate conducting an enquiry as provided for therein on the appearance of the person against whom an order under Section 133 Cr.P.C. was made and the Executive Magistrate has to

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question him as to whether he denies the existence of any public right in respect of the way, river, channel or place in respect of which the order had been made. On such questioning if the concerned aggrieved person denies such right, then the Magistrate before proceeding under Section 138 should inquire into the matter".

3. Countering the said submissions learned counsel for the second respondent submitted that the petitioner had sent his representation dated 10.07.2007 and the same has also been considered by the Sub Divisional Magistrate and only after considering the same the impugned order has been passed and as such the contention of the petitioner that the procedure contemplated in Section 138 of the Criminal Procedure Code has not been followed is not sustainable.

4. I have carefully considered the above said submissions made by the learned counsel on either side. A perusal of the materials on record and the impugned order shows that no enquiry whatsoever has been conducted by the Sub Divisional Magistrate. The procedure contemplated in Sections 133 to 138 of the Criminal Procedure Code have not been followed, therefore, without proper enquiry and without proper application of mind and without serving notice on the affected parties, the Executive Magistrate has chosen to pass the impugned order. Learned counsel for the second respondent is unable to counter the submissions made by the learned counsel for the petitioner. If the ratio laid down in the above said decisions, which was relied upon by the learned counsel for the petitioner, is applied to the facts of this case, the impugned order cannot stand to scrutiny and has to be necessarily set-aside.

5. For the said reasons, the impugned order dated 12.07.2007 made in Na.Ka.No.8720/2007/2007/A6 on the file of the Sub Collector / Sub Divisional Magistrate, Gobichettipalayam, is hereby set-aside and the criminal revision case is allowed with a direction that the Sub Collector / Sub Divisional Magistrate, Gobichettipalayam, Erode District, shall follow the procedures contemplated in Sections 133 to 140 of the Criminal Procedure Code and conduct an enquiry afresh after giving proper opportunity to all the parties concerned and pass appropriate orders on the merits of the case. It is made clear that this Court has not expressed any opinion on the merits of the case. The Sub Collector / Sub Divisional Magistrate, Gobichettipalayam, Erode District, shall complete the enquiry and pass final orders within a period of three (3) months from the date of receipt of a copy of this order.

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Consequently the connected MPs are closed.

srk

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

To

1.The Sub Collector /
The Sub Divisional Magistrate
Gobichettipalayam,
Erode District
+ One cc to Mr. N. Manokaran, Advocate sR 67542
+ One cc to Mr. A.K. Kumarasamy, Advocate sR 67572
sg 19/11/07

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